ECORD
AND
BRIEF

No. 16-466

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
Respondents.

On Writ of Certiorari to the California Supreme Court

BRIEF OF *AMICI CURIAE* ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims – that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the burdens on business, the judicial system, and the economy engendered by the need to defend claims in far distant venues, especially when those claims have little or no connection with the forum chosen by plaintiffs. Many of their employers (in the case of corporate general counsels) or clients (in the case of private practitioners) conduct business in states other than their state of incorporation and the state which is

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

their principal place of business (the forums in which they are subject to general personal jurisdiction, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014)), and thus they have an interest in the rules governing specific personal jurisdiction over nonresident corporations.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost.

The abiding interest of *amici* in the proper limits of the exercise of jurisdiction by courts sitting in venues with non or only tangential connection to the events and contacts underlying the claim and the need to protect due process rights is exemplified by Atlantic Legal Foundation's participation as *amicus* or as counsel for *amici* in *Daimler AG v. Bauman*,134 S. Ct. 746 (2014). IADC, too, has previously weighed in on jurisdictional issues. See, e.g., *Novo Nordisk A/S v. Werner*, No. 13-214 (2013).

Amici believe that the decision of the California Supreme Court in this case is inconsistent with

this Court's precedents and with the due process rights of defendants.

PRELIMINARY STATEMENT

This case involves 575 non-California residents (Respondents here) who brought suit in California State court alleging various California State law product liability claims against petitioner Bristol-Myers Squibb ("Bristol-Myers") based on Respondents' use of Plavix, a prescription drug manufactured by Bristol-Myers and approved by the Food and Drug Administration (FDA) for use in preventing blood clots. Pet. App. 1a, 147a; Pet. 5 & n.1. All of Respondents' claims were based on injuries alleged to have occurred outside California as a result of prescriptions written and filled outside California. Pet. App. 4a, 33a-34a. The plaintiffs in the product liability actions allege that consumers from across the nation suffered injuries after taking Plavix. Pet. App. 27a; see J.A. 42. [2]

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[2] The decision by plaintiffs' lawyers to file eight separate complaints, Pet. App. 2a, each with fewer than 100 plaintiffs, is an example of "forum shopping." Had any of the complaints included 100 or more plaintiffs, Bristol-Myers's would have had the right to remove that complaint to federal court under the Class Action Fairness Act (CAFA). See 28 U.S.C. § 1332(d)(11)(B)(I) (authorizing removal of a "mass action" in which the monetary claims of "100 or more persons are proposed to be tried jointly.".

The plaintiffs' bar considers juries in particular jurisdictions, California among them, to be sympathetic to plaintiffs. "[J]uries in California put a higher value on personal injury cases than the average American does." See, e.g. Ronald V. Miller, Jr., "Average Injury Verdicts in

(continued...)

The 575 nonresident plaintiffs claim no contacts with Bristol-Myers's activities in California or with California generally. Bristol-Myers is incorporated in Delaware, not California, and its principal place of business is New York. Pet. App. 4a; J.A. 82. Plavix is manufactured at a number of facilities, none of which is in California. Pet. App. 5a, 133a; J.A. 85. Sales of Plavix in California constitute only 1.1 percent of Bristol-Myers's total national sales revenue. Pet. App. 5a; J.A. 85.

The California Court of Appeal summarily denied Bristol-Myers's writ petition seeking review of the Superior Court's holding that it could exercise general jurisdiction over Bristol-Myers based on the company's substantial business activity in California. J.A. 9. Following the *Daimler* decision by this Court, the California Supreme Court directed the Court of Appeal to address the merits of Bristol-Myers's petition. J.A. 9-10. On remand, the California Court of Appeal concluded that although *Daimler* precluded assertion of *general* jurisdiction over Bristol-Myers with respect to the claims of the nonresident defendants, Pet. App. 100a-114a, California courts could still assert *specific* jurisdiction over Bristol-Myers. Pet. App. 114a-146a.

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[2](...continued)
California," Accident Injury Lawyer Blog (Dec. 15, 2010), *available at* http://www.accidentinjurylawyer blog.com/ 2010/12/average_injury_verdicts_in_cal.html.

A 4-3 majority of the California Supreme Court upheld the exercise of specific jurisdiction. Pet. App. 20a-44a.[3] The majority recognized that the Due Process Clause (U.S. Const. amend. XIV) bars California courts from exercising specific jurisdiction over Bristol-Myers unless Respondents can demonstrate that their claims "arise out of or are related to [Bristol-Myers's] forum-related activities." Pet. App. 20a-21a. While it did not assert that the claims of Respondents "arise out of" any of Bristol-Myers's California-based activities, the majority concluded that Bristol-Myers's activities were sufficiently "related to" those claims to warrant the exercise of personal jurisdiction. *Id.* at 25a-35a. The majority explained that, under California precedent, a "claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction"; it is enough that a claim bears a "substantial connection" to defendant's forum contacts. *Id.* at 25a, 27a (internal quotations omitted). The majority applied a "sliding scale" approach under which "the intensity of forum contacts and the connection of the claim to those contacts are inversely related." *Id.* at 32a (internal quotations omitted).

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[3]20a-44a The California Supreme Court unanimously held that, under *Daimler* and *Goodyear*, California courts could not exercise general jurisdiction over Bristol-Myers. Pet. App. 11a-19a, 44a; *id.* at 46a (dissent).

The majority held that, in order to satisfy the "related to" requirement, "the defendant's activities in the forum State need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.* at 22a. Instead, the majority held that it is sufficient to demonstrate "a substantial nexus or connection between the defendant's forum activities and the plaintiff's claims." *Id.* at 21a. It explained:

> The more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. Thus, a claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Indeed, only when the operative facts of the controversy are not related to the defendant's contact with the State can it be said that the cause of action does not arise from that contact.

Id. at 22a (citations omitted).

The majority concluded that California courts could exercise specific jurisdiction over Bristol-Myers in cases involving Plavix that was prescribed, distributed, sold, ingested, and allegedly caused injuries to nonresidents outside California. The majority relied substantially on the fact that Bristol-Myers had sold "the same allegedly defective product" to other consumers [outside California] and had engaged in the same

nationwide "marketing and promotion" of Plavix. Pet. App. 28a. The court invoked the "sliding scale" to find that Bristol-Myers's "extensive contacts with California establish minimum contacts based on a less direct connection between [Bristol-Myers's] forum activities and plaintiffs' claims than might otherwise be required." Pet. App. 27a-34a. The majority acknowledged that Respondents were not injured by Plavix in California, were not prescribed Plavix by California doctors, did not have their prescriptions filled by California pharmacists and did not consume Plavix in California. It further acknowledged that Bristol-Myers neither developed nor manufactured Plavix in California, and that the distribution chain for the Plavix supplied to Respondents did traverse California. The majority based its "substantial connection" finding on evidence that Bristol-Myers (1) extensively marketed Plavix to California residents (but not to Respondents) in California as part of a nationwide marketing program; (2) contracted with a California corporation to distribute Plavix and hired several hundred salespersons within the State; and (3) maintains facilities in California that conduct research and development of *other* Bristol-Myers products (but not Plavix). Pet. App. 5a, 29a; J.A. 82.

The California Supreme Court thus held that California could exert personal jurisdiction over Bristol-Myers with respect to the claims not only of the 86 California residents (which Bristol-Myers

does not contest) but also with respect to the 575 nonresident plaintiffs.

Justice Werdegar, joined by Justices Chin and Corrigan, dissented. Pet. App. 46a-87a. They concluded: "*[T]he record contains no evidence connecting the Plavix taken by any of the nonresident plaintiffs to California.*" *Id.* at 47a (emphasis in original). The dissenters criticized the majority for "undermin[ing] [the] essential distinction between specific and general jurisdiction." *Id.* at 50a. They also pointed out that if the requisite connection between the forum and the litigation is established merely because a defendant has engaged in similar nationwide conduct, specific jurisdiction would expand "to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.* They argued that the majority's conclusion that California could exercise jurisdiction over Bristol-Myers in connection with Respondents' claims was based on a specific-jurisdiction standard that conflicts with the standard adopted by this Court, *id.* at 51a-77a, and that the decision undermines the ability of businesses to predict the types of litigation to which they would be exposed when they decide to undertake activities within a State. *Id.* at 79a-80a.

SUMMARY OF ARGUMENT

A state's exercise of jurisdiction comports with federal due process if the nonresident defendant has "minimum contacts" with the state and the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"

Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

The "Due Process Clause . . . limit[s] the power of a State to assert *in personam* jurisdiction over a nonresident defendant." "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); see also *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (both quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

The "minimum contacts" calculus "focuses on the relationship among the defendant, the forum, and the litigation," *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (internal quotation marks omitted), and requires determining that the defendant "purposefully avail[ed]" itself of the forum. Burger King Corp., 471 U.S. 462, 472-476 (internal quotation marks omitted). "Arise out of or relate to" has meant that a defendant's activities in the State must be a cause of the plaintiff's claim. *Helicopteros*, 466 U.S. at 414 n.8.

When a cause of action does not arise out of a defendant's case-specific contacts with the forum State, a court may exercise "general jurisdiction" over a corporation if "the continuous corporate operations within a State are so substantial and of

such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 564 U.S. 915, 919 (internal quotation marks and alterations omitted). If the defendant is a corporation, it is appropriate that a State in which the corporation can be fairly regarded as "at home," such as its "domicile, place of incorporation, and principal place of business," may exercise general personal jurisdiction. *Id.* at 2853-54. *Daimler* made it clear that a State may not exercise general jurisdiction over a corporation when the corporation is neither incorporated in nor has its principal place of business within the State, as in this case, even when the corporation has other contacts with the State. The court below understood that it could not exercise general jurisdiction over Bristol-Myers. The only basis, then, for exercising personal jurisdiction over Bristol-Myers in this case would be "specific jurisdiction."

"[W]hen a State exercises personal jurisdiction over a defendant in a suit in which plaintiff's claims "arise out of or relate to" the defendant's contacts with the forum State, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 414 n.8. This Court's specific jurisdiction jurisprudence after *International Shoe* teaches that the existence or absence of a causal link between defendant's contacts with the State and plaintiff's claimed injury is essential in determining whether jurisdiction exists.

The California Supreme Court's analysis and holding on specific jurisdiction are fatally flawed. That court ignored the consistent teaching of this Court on the nature of contacts that can underpin the assertion of specific jurisdiction. The California court identified nothing Bristol-Myers did in the State that gave rise to the claims in their cases. And it is irrelevant that claims against another defendant and claims brought by other plaintiffs are subject to California jurisdiction. To establish specific jurisdiction, a plaintiff must identify acts connecting the defendant's actions *in California* with the plaintiff's claims.

Further, the California court's analysis is divorced from the realities of interstate commerce. That court's criteria for finding that California courts can exercise personal jurisdiction in cases such as this thwarts the expectations of out of State (and foreign) companies that serve markets in the United States, especially in sectors that are complex, require massive investment and thus depend on nationwide and world-wide markets, draw on talent located in numerous States and countries, and require national or supranational regulatory approvals of several jurisdictions,.

The decision below deprives businesses of adequate means to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SPECIFIC JURISDICTION DECISIONS

Over the last seventy years, this Court has identified and described the due process requirements for the exercise of personal jurisdiction. A court may exercise *in personam* jurisdiction only if the defendant has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). The minimum-contacts requirement ensures that a defendant has "fair warning" that a decision to engage in particular activities may subject it to the jurisdiction of a foreign sovereign. *Burger King*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The nature of forum contacts that provide such fair warning hinges on whether a court is exercising "general" or "specific" jurisdiction. See *Burger King*, at 472-73 & n.15; *Daimler*, 134 S. Ct. 746, 757 (2014) (referring to "'the essential difference between case-specific and all-purpose (general) jurisdiction'") (quoting *Goodyear*, 564 U.S. 915, 927 (2011)).

General jurisdiction is established when a defendant's contacts "are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear*, 564 U.S. 919-920

(citation omitted). "For an individual [defendant], the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation *is fairly regarded as at home*" (such as the State of incorporation or principal place of business). *Goodyear*, 564 U.S. at 924 (emphasis added).

Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation," *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (internal quotation marks omitted).

The Court's personal jurisdiction jurisprudence can be distilled to several principles. *First*, due process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King*, 471 U.S. 462, 471-472 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). A court may subject a person to jurisdiction only when that person has sufficient contacts with the State "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316; see also *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion). The "minimum contacts" requirement serves important functions in our federal system: it protects the defendant from being required to defend a lawsuit in an inconvenient forum and it "acts to ensure that the States through their courts, do not reach out beyond the limits imposed

on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. It also "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. 462, 472 (1985).

Second, the Due Process Clause prohibits a court from exercising personal jurisdiction unless the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. 286, 297 (1980). "[E]xorbitant" exercises of personal jurisdiction "are barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, 134 S. Ct. at 751.

Third, the requirement of minimum contacts ensures that the defendant has "fair warning" that its decision to engage in certain activities may subject it to a foreign court's jurisdiction and "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. 462, 472 (1985). In *Daimler* this Court recently acknowledged that predictability is an important aspect of due process, noting that even corporations with nationwide sales are entitled to some "minimum assurance[s]" about where their conduct will render them liable to suit. *Daimler*,

134 S. Ct. at 760-62; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions.")

Fourth, a State's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). "[I]t is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of "fair play and substantial justice."' *J. McIntyre Mach.*, 564 U.S. 873, 880, 131 S.Ct. 2780, 2783 (2011).

The Court has consistently held that a State court may not exercise personal jurisdiction over an out-of-State defendant merely because the defendant has engaged in continuous and systematic activities within the State; the assertion of personal jurisdiction also requires a showing that the defendant's activities are sufficiently connected to the claim. *See, e.g., Daimler*, 134 S. Ct. at 757 ("a corporation's 'continuous activity of some sort within a State is not enough to support the demand that the corporation be amenable to suits unrelated to that activity'") (quoting *International Shoe*, 326 U.S. at 318). Since *International Shoe*, this Court has made it clear that "specific or case-linked" jurisdiction requires a causal connection between the defendant's forum conduct and the litigation. *Goodyear*, 564 U.S. 915, 919. In other words, personal jurisdiction may not be exercised over

nonresident defendants based on claims "having nothing to do with anything that occurred or had its principal impact in" the forum State. *Daimler*, 134 S. Ct. at 762.

Cases involving specific jurisdiction require a lesser showing of forum contacts by the defendant but still allow a court to assert jurisdiction only if the plaintiff's claims "arise out of or relate to" those contacts. *Helicopteros*, 466 U.S. 408, 414 & nn.8-9 (1984).[4]

Thus, for the California courts to exercise personal jurisdiction over Bristol-Myers with respect to the claims asserted by Respondents, they must satisfy the requirements of "specific jurisdiction" – that is, that the claim "arises out of or relates to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 754.

A. Respondents' Claims Do Not "Arise Out Of" Or "Relate To" Bristol-Myers's Contacts with California.

Specific jurisdiction gives a State authority to adjudicate disputes "arising out of or relating to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 754 (quoting *Helicopteros*,, 466 U.S.

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[4] We will not dwell on general jurisdiction nor on the differences between general and specific jurisdiction because as noted above it is undisputed that Bristol-Myers is neither incorporated in California, nor does it maintain its principal place of business in the State, (see *Daimler*, 134 S. Ct. at 760), Pet. App. 4a; J.A. 82, and both the majority and the dissent agreed that Bristol-Myers was not subject to general jurisdiction in California. Pet. App. 9a-19a, 46a.

408, 414 n.8); see also *International Shoe*, 376 U.S. at 319. We submit that the phrases "arising out of" and "relate to" incorporate the notion of a causal relation between the defendant's in-State acts and plaintiff's alleged injury, and that specific jurisdiction exists only when the defendant's contacts with the forum caused the plaintiff's alleged injuries and the resulting claim. There is no such causal relationship between Bristol-Myers's acts in California and Respondents' ingestion of (and alleged injury from) Plavix in the more than 30 other States in which those plaintiffs reside, and bought and used Plavix.

In deciding that Respondents' claims in this case "arise out of or relate to" Bristol-Myers's contacts with California, the California Supreme Court principally relied on evidence that Bristol-Myers markets Plavix nationally and that its California marketing efforts are similar to its marketing efforts in the non-California plaintiffs' home States. Pet. App. 28a.[5] The court concluded that Respondents' claims "are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product [as asserted by other, California-based plaintiffs], which allegedly caused injuries in and outside the State. Thus, the nonresident plaintiffs' claims bear a substantial connection with Bristol-Myers's contacts in California." *Ibid.*

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[5] There was no evidence, or even an allegation, that any of the non-California plaintiffs saw Plavix ads that were published in California.

The California Supreme Court also cited the fact that "Bristol-Myers maintains research and laboratory facilities in California, and it presumably enjoys the protection of our laws related to those activities," Pet. App. 29a. The California Supreme Court's majority conceded that none of those facilities ever conducted any research related to Plavix, yet it concluded that the existence of those facilities "provides an additional connection between the nonresident plaintiffs' claims and the company's activities in California." *Ibid.* The Court justified that "substantial nexus and connection" finding on the fact that the complaint includes claims that *other* Bristol-Myers research facilities located in *other* States were responsible for the allegedly negligent development and design of Plavix.[6] That justification, which is based on nothing more than a belief that a very general similarity of function (scientific research) between Bristol-Myers's California research facilities and its research facilities elsewhere somehow connects Bristol-Myers's alleged tortious conduct in this case with respect to a particular product to California illustrates the amorphous, all-encompassing, and essentially boundless scope of the California court's assertion of personal jurisdiction over nonresident companies that

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[6] The California court's use of the phrase "and [Bristol-Myers] presumably enjoys the protection of our laws related to those activities..." is a clue that the state court was eliding the concepts of general and specific jurisdiction.

conduct *any* business within the State. As far as the California Supreme Court is concerned, the requisite minimum contacts among Bristol-Myers, the forum, and the litigation can be established even when, as here, "the nonresident plaintiffs' claims would be exactly the same if Bristol-Myers had no contact whatever with California." *Id.* at 29a. That can fairly be described as the "kitchen sink" rule of personal jurisdiction.

The California Supreme Court's conclusion that causation could be dispensed with so long as the defendant's contacts are sufficiently "wide ranging" is wrong and impermissibly blurs the distinction, heretofore quite clear, between specific jurisdiction and general jurisdiction. The so-called "sliding scale approach" lacks any basis in this Court's precedents. Indeed, it is inconsistent with *International Shoe*, the foundational precedent; in that case the Court held that isolated in-State activities do not permit jurisdiction of "causes of action unconnected with the activities there." *International Shoe*, 326 U.S. at 317.

In *Helicopteros*, 466 U.S. 408 (1984), the Court determined that the defendant's numerous contacts with Texas were insufficient to permit that State to exercise personal jurisdiction because those contacts did not arise out of or relate to the plaintiffs' claims which involved injuries arising from a helicopter crash in Peru.

Burger King took the same causal approach in assessing the link between the litigation and the forum. Much like in *International Shoe*, the Court said that specific jurisdiction is proper where "the

litigation results from alleged injuries that 'arise out of or relate to' th[e] [defendant's] activities" in the forum State. *Burger King*, 471 U.S. at 472 (internal quotation marks omitted). That connection exists, the Court explained, where the litigation seeks to hold a defendant "to account * * * for consequences that arise *proximately* from such activities." *Id.* at 474 (emphasis added). Thus, a franchisee could be sued in Florida for a "franchise dispute [that] grew *directly* out of" a contract negotiated and performed in Florida and that "*caused foreseeable* injuries" in the State. *Id.* at 479-480 (emphases added).[7]

In *Walden v. Fiore*, the Court held that the plaintiff could not bring a tort suit in Nevada because it was "undisputed that no part of [the defendant's] course of conduct occurred in Nevada" and the plaintiffs had not been injured "because [of] anything" the defendant did there. 134 S. Ct. at 1124-1125 (emphases added). This Court

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[7] As Justice Werdegar explained in dissent:

> Of the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation. (See *Burger King Corp. v. Rudzewicz*, (1985) 471 U.S. 462, 479-80 [specific jurisdiction in Florida courts proper where franchise dispute "grew directly out of" contract formed between a Florida franchisor and Michigan franchisee, whose breach caused "caused foreseeable injuries to the corporation in Florida."]).

Pet. App. 53a-54a.

emphasized that the specific jurisdiction inquiry "focuses on the relationship among the defendant, the forum, and the litigation" and held that "[f]or a State to exercise jurisdiction consistent with due process, *the defendant's suit-related conduct must create a substantial connection with the forum State.*" 134 S. Ct. at 1121 (emphasis added; internal quotation marks omitted). This Court held that a Nevada court lacked specific jurisdiction over claims against a DEA agent arising from the seizure of a Nevada plaintiff's cash at the Atlanta airport. The Court agreed that the injury allegedly caused by defendant's conduct occurred in Nevada because plaintiff resided there and that the defendant was aware of the plaintiff's residence. *Id.* at 1125. The Court nevertheless concluded that those facts were insufficient to establish that the plaintiff's claims "arose out of or were related to" *defendant's* Nevada contacts. It explained that "[f]or a State to exercise jurisdiction consistent with due process," it is the defendant's "suit-related conduct" that must create a "substantial connection" with the forum State, *id.* at 1121, and that plaintiff's residence was unrelated to the defendant's actions in Atlanta. Due process prohibited a Nevada court from exercising personal jurisdiction. The decision below, which based specific jurisdiction on Bristol-Myers's California contacts that were not "suit related," is inconsistent with *Walden*. See also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (specific jurisdiction is warranted "when

the cause of action arises out of the very activity being conducted, in part, in [the forum State]")

This Court has repeatedly rejected assertions of jurisdiction because the claims at issue did not "arise[] out of an act done or transaction consummated in the forum State," *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); or "ar[o]s[e] from [an act] that occurred" elsewhere, *Kulko v. Superior Court*, 436 U.S. 84, 97 (1978); or did not "stem from a constitutionally cognizable contact with" the forum, *World-Wide Volkswagen*, 444 U.S. 286, 299. We have found no case in which the Court found specific jurisdiction in the absence of a causal relationship between the defendant's forum contacts and the plaintiff's claim.

B. The California Supreme Court's Expansive Concept of Specific Jurisdiction Ignores This Court's Admonition That Jurisdiction Rules Should Promote Predictability.

The Due Process Clause entitles potential defendants to "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Burger King*, 471 U.S. at 472 (internal quotation marks omitted) and thus to "predictability" about when they can be hailed into court, *World-Wide Volkswagen*, 444 U.S. at 297, in a place where they are not "at home," *Goodyear*, 564 U.S. at 924.

This enables businesses and individuals to "structure their conduct with some guidance as to what conduct will and will not render them liable to suit," and to take actions to "alleviate the risk of

burdensome litigation" – including by "procuring insurance, passing the expected costs on to customers," and, if necessary, "severing [their] connection with [a] State" altogether. *World-Wide Volkswagen*, 444 U.S. at 297.

Simplicity, clarity and predictability are related. The Court explained in *Daimler* that it adopted its rule governing general jurisdiction over corporations in part because ascertaining a corporation's principal place of business and its place of incorporation – the criteria that *Daimler* held are determinative of where a corporation is "at home" and thus amenable to general jurisdiction – is a relatively straightforward exercise: "These bases afford plaintiffs at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Daimler*, 134 S. Ct. at 760. See *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (the Court has a preference for "[s]imple jurisdictional rules" that "promote greater predictability").

The California court's "substantial nexus or connection test" is anything but simple, clear and unambiguous. It establishes a "sliding scale" – a showing that the defendant has numerous forum contacts (regardless of whether they are related to the case at bar). While it reduces the required showing of connection between those contacts and the plaintiffs' claim, Pet. App. 22a, the degree of reduction is not specified, and presumably will be determined on a case-by-case basis. *Id.* at 35.

Goodyear, at least implicitly, rejected that approach. In *Goodyear*, the Court held that the

litigation lacked a sufficient link to North Carolina "[b]ecause the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad." 564 U.S. at 919 (emphasis added). In that case several individuals sued a foreign company in North Carolina after allegedly defective tires caused a bus accident in France. 564 U.S. at 918. The North Carolina Court of Appeals purported to exercise general jurisdiction over the defendant because the defendant also sold tires into North Carolina through "the stream of commerce." *Id.* at 919-920.

This Court unanimously reversed. The North Carolina court's stream-of-commerce analysis, it held, "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.* at 927. "Flow of a manufacturer's products into the forum * * * may bolster an affiliation germane to *specific* jurisdiction," *id.*, but unless the defendant's forum activity is so continuous and systematic as to render the company "at home," *id.* at 929, it is "not enough to support the demand that the corporation be amenable to suits unrelated to that activity," *id.* at 927 (emphasis added) (internal quotation marks omitted). By "[c]onfusing or blending general and specific jurisdictional inquiries," the Court held, North Carolina had offered an "inadequate basis for the exercise" of jurisdiction. *Id.* at 919-920.

The decision below departs from that clear principle and thus effectively circumvents long-settled limits on "stream of commerce"

jurisdiction. In so doing, it creates greater uncertainty for product manufacturers.[8] Under the California Supreme Court's approach the decision to forbear manufacturing or selling a product in a State affords little protection if the defendant has substantial other, unrelated, business activities there.

The court below concluded that California courts can exercise specific jurisdiction over Respondents' claims based on a somewhat random combination of disparate California contacts. The California court did not assign a rank or weight to each of those contacts, or explain whether any one of them, by itself, might be sufficient to establish personal jurisdiction.

In contrast, the reasoning in *Goodyear* provides a straightforward rule for specific jurisdiction in product liability and tort cases: If the allegedly defective product was not manufactured or sold in the forum State and the plaintiff was not injured in the forum State, there is no specific jurisdiction in the forum. That clear rule provides significant predictability. If a manufacturer knows that it will be subject to specific jurisdiction in cases involving a particular product only in a State where it has

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[8] A California court presiding over cases such as these would be in the position of applying the laws of more than 30 other States in which the out-of-State plaintiffs reside, purchased the product, or were allegedly injured, under usual choice of law rules, even though State courts frequently lack experience in applying the law of other States.

manufactured or sold that product, and only for the particular product actually manufactured, sold, or which caused injury in that State, it can make an informed decision about whether and to what extent it wishes to manufacture in or sell in the State. Such a rule aligns economic interests with judicial doctrine.

In contrast, the California court's "sliding scale" approach, like the North Carolina court's reasoning in *Goodyear*, confuses the concepts of, and criteria for, general and specific jurisdiction. The sliding scale test purports to determine whether a defendant is subject to specific jurisdiction on a plaintiff's claim by weighing "the intensity of [defendant's] forum contacts" (a consideration relevant to general jurisdiction) against "the connection of the claim to those contacts" (a consideration relevant to specific jurisdiction). Pet. App. 22a.

As the dissent below pointed out, the majority's approach "undermines" the "essential distinction between specific and general jurisdiction" as articulated in both *Daimler* and *Goodyear* and "expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction,"and "creates the equivalent of general jurisdiction in California courts." Pet. App. 50a-51a.

The sliding scale approach results in a manufacturer such as Bristol-Myers being subject to specific jurisdiction in California on all defect claims for any of its products sold nationwide. The court below wrote that Bristol-Myers "embraced

th[e] risk" of being sued in California by nonresident plaintiffs when it decided to include California within its nationwide Plavix sales efforts. Pet. App. 33a. It did not, however, explain why Bristol-Myers assumed a risk of suit in California by advertising Plavix to patients in Texas, New York, or Illinois. Moreover, it is unrealistic for manufacturers to exclude a market as large as California from their marketing efforts, nor would it serve the interests of Californians to be denied the benefit of pharmaceuticals, or other useful products, because a producer of such goods fears being subject to suit in California on claims by residents of other States or countries. The California court would, essentially, require a company to choose between access to a large market and the risks of virtually unlimited exposure to suit.

If, as the California court believes, plaintiffs can bring claims in any State as long as they allege a "common nationwide course of distribution," Pet. App. 28a, a business's ability to predict where it is subject to suit, and its ability to tailor its conduct to limit exposure to litigation, or to obtain insurance to cover the risk, would be drastically reduced, because a "company's potential liabilities [could not] be forecast from its [in-]State activities." *Id.* at 83a (Werdegar, J., dissenting).

An out-of-State corporation has little guidance regarding what activities in California will subject them to the jurisdiction of California courts for claims arising outside the State. That result is

inconsistent with *Daimler*'s (and the Due Process Clause's) goal of predictability.

As the *Daimler* Court discerned in rejecting the Ninth Circuit's expansive concept of personal jurisdiction over nonresident defendants based on claims arising outside the forum, "exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-State defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King*, 471 U.S. 462, 472 (1985)).

If this Court does not reverse the decision below, other jurisdictions are likely to adopt a similar wide-ranging definition of "specific jurisdiction." Any plaintiff who purchased the product anywhere could bring suit in any State where the product was sold, simply by alleging that the manufacturer engaged in a "common nationwide course of distribution." Manufacturers effectively would be subject to general jurisdiction in every State in which they sell their products. Such an approach allows a State court to vary the scope of the relatedness requirement according to the quantity and subjective "quality" of the defendant's forum contacts, the result being a "totality of circumstances" test that completely undermines predictability.

CONCLUSION

This Court should reverse the judgment of the California Supreme Court.

Respectfully submitted,
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